IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

PHIL BREDESEN, Governor of the State of Tennessee, Plaintiff, v. TENNESSEE JUDICIAL SELECTION COMMISSION, Defendant.	)	No. M2006-02721-COA-R3-CV Appeal from the Chancery Court of Davidson County No. 06-2275 III

BRIEF OF APPELLANT, J. HOUSTON GORDON

Charles W. Bone (#002366)
Charles Robert Bone (#021161)
BONE McALLESTER NORTON PLLC
511 Union Street, Suite 1600
Nashville, TN 37219
615-238-6300

LYLE REID (#07779)
P. O. Box 198
Brownsville TN 38012
731-772-7441

IRMA MERRILL STRATTON (#011605)
2121 One Commerce Square
Memphis, TN 38103
901-526-6464

TIMOTHY W. SMITH (#020291)
2670 Union Extended, Suite 1200
Memphis, TN 38112
901-323-8048

Attorneys for Appellant, J. Houston Gordon

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STATEMENT OF ISSUES

I.

Whether the provisions of T.C.A. §§17-4-109(e) and 112(a) require that, before the Governor is authorized to make an appointment to fill a judicial vacancy, he must have before him three (3) persons nominated by the Judicial Selection Commission who are both qualified and available for appointment.

II.

Whether the trial court's decision raises issues under the Tennessee Human Rights Act as set forth in T.C.A. §§4-21-101 *et seq*. Art. I, §8, Art. XI, §8 and Art. XI, §16 of the Tennessee Constitution and/or the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On September 18, 2006, the Plaintiff, Governor of the State of Tennessee, filed a declaratory judgment action against the Judicial Selection Commission, a part of the Judicial Department of Tennessee government. The complaint sought declaratory relief and interpretation of the provisions of T.C.A. §§17-4-101, *et seq.*, Tennessee Plan. (Technical Record ("T/R") 1, Complaint). Specifically, the complaint presented only one narrow question: that T.C.A. §17-4-112(a) requires "that the Judicial Selection Commission, upon rejection of the Governor of the three nominees contained in the first panel" is required to submit three nominees, none of which were originally nominated. (T/R 9, Complaint, p. 9, ¶3). In addition, the Governor sought to have the trial court declare that the three nominees certified by the Commission on September 7, 2006 are not valid because the certification contained the name of "a rejected nominee from the first panel." (T/R 9, Complaint, p. 9, ¶4) Appellant, J. Houston Gordon is the "rejected nominee." The Governor sought a declaration that he has "no legal duty" to make any appointment to fill the vacancy until the Judicial Selection Commission submits a panel that is "validly constituted in accordance with T.C.A. §17-4-112(a)." (T/R 9, Complaint, p. 9, ¶4).

On November 14, 2006, the Defendant Judicial Selection Commission filed its Answer to the Complaint for Declaratory Judgment. (T/R 22). In that answer, the Commission asserted (1) the Governor's first letter "return of the first panel of nominees was not a rejection under Tenn. Code. Ann. §17-4-112(a)"; (2) if the return was a rejection, it was unlawfully based on considerations of race prohibited by statutory and constitutional law; (3) the Governor's attempt by his second letter to cure the failure to reject reiterated the invalid reasons; and (4) that the Governor's instructions to the Commission encroached on the Commission's prerogatives under T.C.A. §§17-4-101, 109, 110. (T/R 24-25).

The next day, November 15, 2006, the Governor filed a motion for summary judgment. (T/R 27).

On November 16, 2006, the Judicial Selection Commission filed its Motion for Order Naming A Necessary Party Pursuant to Rule 19.01 and T.C.A. §29-14-107, designating Gordon as the necessary party to be added. (T/R 32).

On November 21, 2006, the Governor responded to the Judicial Selection Commission's motion to add Gordon as a necessary party, asserting that Gordon was not a necessary party but that he did not oppose Gordon's being named a party so long as the motions for summary judgment would still be heard on December 13, 2006. (T/R 37).

Gordon filed a separate Motion to Intervene (T/R 41) on November 27, 2006 and, as required by Rule 24, Tennessee Rules of Civil Procedure, attached a Counter-Complaint and Cross-Complaint for Declaratory Judgment (T/R 51), which were served on the Governor and the Commission, and filed a Memorandum in Support of Motion to Intervene.

On November 28, 2006, Gordon filed a Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Intervenor's Motion for Summary Judgment on the Counter Complaint and Cross Complaint. Seeking to narrow the issues and to expedite the proceeding, Gordon filed Requests for Admissions and Interrogatory to the Judicial Selection Commission and to the Governor (T/R 107). On that same date, Gordon filed a Motion for Additional Time for Discovery or, in the Alternative, Intervenor's Initial Response in Opposition to Plaintiff's Motion for Summary Judgment. (T/R 79).

On November 29, 2006, George T. Lewis filed a motion to intervene. (T/R 89).

On November 30, 2006, the trial court entered an order requiring the Governor and the Judicial Selection Commission to file responses to the motions to intervene by noon on December 4,

2006 and requiring replies to be filed by December 5, 2006 at 4:00 p.m. (T/R 91).

On December 4, 2006, the Governor filed his Response in Opposition to J. Houston Gordon's Motion to Intervene. (T/R 95).

On December 5, 2006, Gordon filed a Reply to Plaintiff's Response In Opposition to Gordon's Motion to Intervene wherein the Plaintiff asserted that no discovery of facts was necessary and that Gordon should not be allowed to assert any claims or counterclaims as an intervenor. (T/R 129).

On December 6, 2006, the trial court entered a Memorandum and Order finding that Gordon was a necessary party under Rule 24.01, that Gordon's interests were separate and distinct from the Commission's interests and that his interests would not be adequately protected by the existing parties. The trial court, in the same order, *sua sponte*, struck Gordon's requests for admissions and interrogatory, stating "They are, for the most part, statements of conclusions of law or facts that are not disputed." (Emphasis added.) (T/R 148, 155).

An Agreed Order was entered allowing Lewis to intervene. (T/R 166).

On December 8, 2006, Lewis filed his Answer and Counter Claim (T/R 157) and Motion for Summary Judgment (T/R 166), along with a Rule 56.03 Statement of Undisputed Facts (T/R 160) and a Memorandum in support of summary judgment.

On December 12, 2006, Plaintiff filed Plaintiff's Reply to Intervenor Lewis' Counter Claim (T/R 207) and Statement of Undisputed Facts. (T/R 202).

On December 13, 2006, Gordon's counsel filed a Rule 56.07 affidavit setting forth reasons why Gordon was entitled discovery. (T/R 214).

On December 13, 2006, oral argument was heard.

On December 14, 2006, the Chancellor entered her order granting summary judgment to

Plaintiff, dismissing Lewis' and Gordon's claims under T.C.A. §4-21-101, *et seq.*, and dismissing Gordon's and Lewis' claims under equal protection for failure to state a cause of action, implicitly denying Gordon's discovery request. The Chancellor ordered Gordon's name to be removed from the September 7, 2006 panel. The Chancellor entered a "final judgment". (T/R 231).

Both Gordon and Lewis timely filed their notices of appeal. (T/R 254, 256). On January 3, 2007, this Court granted Gordon's and Lewis' motion to assume jurisdiction, suspended the Rules of Appellate Procedure and set an expedited briefing schedule.

STATEMENT OF FACTS

In early 2006, Justices Anderson and Birch announced their retirements from the Supreme Court effective August 31, 2006, creating two vacancies. One vacancy was filled without procedural mishap by the appointment of Justice Gary Wade. This statement of facts begins with that background. Shortly after the retirements were announced, the procedure to selecte new justices was commenced pursuant to T.C.A. §17-4-101 *et seq.*, the Tennessee Plan.

At the initial April 20, 2006 public hearing required by the Plan, there were eleven applicants, including three African Americans. The applicants included three appellate judges, three trial judges and five practicing attorneys. After reviewing the applications, conducting investigations, holding public hearings and interviewing each applicant privately, the Judicial Selection Commission certified to the Governor the names of Judge Gary Wade, Chancellor Richard Dinkins and Attorney J. Houston Gordon. Governor Bredesen chose Justice Wade to fill one of the vacancies on the Court.

The Judicial Selection Commission then gave public notice pursuant to T.C.A. §17-4-109(a)(2) and (b) that it would accept applications for nominations to fill the remaining vacancy and encouraged potential candidates to apply. At the July 17, 2006 public hearing for the remaining vacancy, there were nine applicants, including four African Americans. The applicants included two appellate judges, three trial judges, three practicing lawyers, and one lawyer who served as the Chief Administrative Officer for Shelby County. Pursuant to the Plan, these applicants appeared before the Commission at a public hearing on July 17, 2006 and subsequently were questioned in private interviews by the Commission. The Commission, in executive session, selected three (3) persons as being those whom the Commission "deemed best qualified and available to fill the vacancy" on the

Supreme Court. On July 18, 2006, the Commission certified the names of those nominated, Chancellor Richard H. Dinkins, Attorney George T. "Buck" Lewis, and Attorney J. Houston Gordon.

On July 24, 2006, Chancellor Dinkins withdrew his name as a nominee.

On July 24, 2006, Gordon and Lewis were informed by the Governor's office that Chancellor Dinkins had withdrawn and that the Governor was "returning the panel" to the Commission. On that same date, the Governor sent the following letter to the chair of the Judicial Selection Commission:

24 July 2006

The Honorable T. Michael Bottoms
Chair, Judicial Selection Commission
District Attorney General
22nd Judicial District
252 N. Military Avenue, Suite 202
P. O. Box 459
Lawrenceburg, TN 38464-0459

Re: Tennessee Supreme Court Nominee Panel

Dear General Bottoms:

I am writing to return to the Judicial Selection Commission the panel of nominees certified to me last week for the vacancy on the Tennessee Supreme Court. I have received a letter from Chancellor Richard Dinkins withdrawing his name as one of the three nominees, and therefore I am requesting pursuant to Tenn. Code Ann. §17-4-112(a) that the Commission submit a new panel of nominees.

I appreciate the outstanding work that Chancellor Dinkins has done as a trial court judge, and I respect his decision to put his children's needs ahead of his career. This State has been privileged over the past thirteen years to have an excellent Supreme Court that reflects the diversity of Tennessee. As you know, I have always sought to appoint judges who meet the highest professional and personal standards. Among such highly qualified persons, diversity is a significant factor that I believe should be considered. With Chancellor Dinkins' withdrawal, I no longer have the opportunity to consider that factor.

I therefore request that the Commission send me a new panel of nominees that includes qualified minority candidates. I further request the Commission select the new panel as expeditiously as possible, so that I can make this appointment before September 1st, when the court vacancy occurs.

Warmest regards,

s/Phil Bredesen
Phil Bredesen

(T/R 13, Exhibit C to Complaint).

At a special public meeting of the Commission on August 8, 2006, various members of the Commission expressed concern as to whether the "return" of the nominees on the panel was a "rejection" under T.C.A. §17-4-112 or simply a "return" of the incomplete panel. A majority of the Commission voted to send the following message to the Governor:

August 9, 2006

Honorable Robert E. Cooper, Jr.
Legal Counsel to the Governor
G-10 State Capitol
Nashville, TN 37243-0001

Re: Judicial Selection Commission

Dear Mr. Cooper:

The Judicial Selection Commission met on August 8, 2006 at a special called meeting by request of five members pursuant to the Bylaws of the Commission.

The Commission voted to request the governor to clarify, in writing, if he intended to reject the entire panel in his July 24, 2006 letter and if so, his reasons for rejecting the panel.

I know you are extremely busy, but the Commission would appreciate your response as soon as is practicable.

Sincerely,

s/Mike Bottoms
Mike Bottoms
Chairman
Judicial Selection Commission

MB:ls

(T/R 14, Exhibit D to Complaint).

The Governor responded on the same date with the following message:

9 August 2006

The Honorable T. Michael Bottoms
Chair, Judicial Selection Commission
District Attorney General
22nd Judicial District
252 N. Military Avenue, Suite 202
P. O. Box 459
Lawrenceburg, TN 38464-0459

Re: Tennessee Supreme Court Nominee Panel

Dear General Bottoms:

I am writing in response to your letter of yesterday seeking additional comment on my letter of July 24th.

In my previous letter, I requested that the Judicial selection Commission submit to me a new panel of nominees of the vacancy on the Tennessee Supreme Court pursuant to Tenn. Code Ann. §17-4-112(a). By invoking section 17-4-112(a), I reject the first panel of nominees. Please accept this letter as a reaffirmation that I rejected the panel for the reason stated in my previous letter, which is attached and incorporated herein.

Thank you for your continued attention to this important matter.

Warmest regards,

s/Phil Bredesen
Phil Bredesen

(T/R 15, Exhibit E to Complaint).

In a public meeting on August 22, 2006, the Commission adopted the following resolution:

RESOLUTION OF THE
TENNESSEE JUDICIAL SELECTION COMMISSION

WHEREAS, *there is currently an unfilled vacancy on the Tennessee Supreme Court; and*

WHEREAS, *the Tennessee Judicial Selection Commission has a statutory duty to submit to the Governor the best qualified persons available for service to fill the vacancy regardless of race, color, creed, national origin, gender, or religion; and*

WHEREAS, *the Commission is committed to submitting a diverse body of qualified candidates to the Governor for consideration, and therefore deems a per se exclusion of an applicant solely on the base of his or race to be unconstitutional; and*

WHEREAS, *on July 17, 2006, the following applicants had applied for the Supreme Court vacancy:*

D'Army Bailey
Frank Clement, Jr.
Richard H. Dinkins
David D. Day
John T. Fowlkes, Jr.
J. Houston Gordon
William C. Koch, Jr.
George T. Lewis
J. C. McLin; and

WHEREAS, *the Honorable Richard H. Dinkins has withdrawn his application from consideration; and*

WHEREAS, *additional applicants subsequent to July 17, 2006, have filed for the vacancy.*

NOW, THEREFORE, BE IT RESOLVED that all applicants, irrespective of race, *creed, color, national origin, gender or religion, who had previously submitted applications for the Supreme Court vacancy on or before July 17, 2006, will be considered by the Commission for the vacancy, unless any application withdraws or notifies the Commission in writing that he does not wish to be considered.*

BE IT FURTHER RESOLVED *that all applicants who had applied prior to July 17, 2006, need not re-apply, submit additional speakers for public session, or participate in the interview process unless they so request in writing.*

BE IT FURTHER RESOLVED *that all new applicants subsequent to July 17, 2006, shall comply with the requirements and procedures regarding application, public hearing, and interview process of the Commission.*

(T/R 16, Exhibit F to Complaint).

Seventeen individuals, including nine minority applicants, filed applications. On September 5, 2006, the Commission, after holding a public hearing and meeting privately with each applicant, determined that Judge D'Army Bailey, Judge William C. Koch, and Attorney J. Houston Gordon were the three (3) persons "best qualified and available" to fill the vacancy on the Supreme Court.

Their names were certified to the Governor by letter dated September 7, 2006. (T/R 17, Exhibit G to Complaint).

Pursuant to the Tennessee Plan, Gordon, an attorney licensed to practice in the State of Tennessee, is qualified and available to fill the vacancy on the Tennessee Supreme Court, as previously certified.

JURISDICTIONAL STATEMENT AND STANDARD OF REVIEW

This matter pends in the Supreme Court on direct appeal from the Chancery Court for Davidson County, Tennessee, pursuant to T.C.A. § 16-3-201, the Court having found that this matter, "is indisputably a case of 'unusual public importance in which there is a special need for expedited decision' and ... involves both 'the right to hold...public office' and 'issues of constitutional law.'"

The review by this Court of the trial court's interpretation of the Tennessee Plan, T.C.A. §§17-4-101, *et seq.*, the Tennessee Human Rights Act, T.C.A. §17-21-101, *et seq.*, and any other question of law, is plenary, *de novo* and with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913 (Tenn. 2000); *Lucius v. City of Memphis*, 925 S.W.2d 522 (Tenn. 1996). The standard of review of the trial court's grant or denial of summary judgment is also *de novo* with no presumption of correctness. *Godfrey v. Ruiz*, 90 S.W.3d 692 (Tenn. 2002); *Guy v. Mutual of Omaha Ins. Co.*, 79 S.W.3d 528 (Tenn. 2002); *Blair v. West Town Mall*, 130 S.W. 3d 761 (Tenn. 2004).

Should the Court find it necessary to do so, its review of the trial court's dismissal of Intervenors' claims under equal protection for failure to state a cause of action is to be reviewed with "scrutiny," the allegations of fact are to be taken as true, with the complaints to be construed liberally in favor of the Intervenors. *Huckeby v. Spangler*, 521 S.W.2d 568, 571 (Tenn. 1975); appeal after remand 563 S.W.2d 555 (Tenn. 1978).

BRIEF AND ARGUMENT

I.

THE TRIAL COURT ERRED IN CONSTRUING THE RELEVANT PORTIONS OF THE TENNESSEE PLAN.

(A)

INTRODUCTION

The original Complaint for Declaratory Judgment and the subsequent filings of the parties seek the interpretation and construction of portions of Title 17, Chapter 4, Tennessee Code Annotated, The Tennessee Plan, and a declaration of the respective obligations and prerogatives of the Governor and the Judicial Selection Commission and of the respective legal rights of Gordon and Lewis as nominees under The Tennessee Plan.

Resolution of the case requires the determination of the selection procedure mandated by the statute in the context of the facts of this case. The actions of the Governor and those of the Commission, so far as their actions are consistent with the statutory procedure, must be respected and upheld, and the legal rights of Gordon and Lewis as nominees must be protected. As set forth below, there is not, in law or fact, any conflict between the obligations and prerogatives of the Governor and those of the Commission, nor is there any conflict between the obligations and prerogatives of the Governor and the Commission and the legal rights of Gordon and Lewis. Consequently, appropriate resolution of the case will preserve the statutory selection procedure, the separate essential roles in that procedure delegated to the Governor and the Commission, and also protect the legal rights of the nominees Gordon and Lewis.

The importance of correcting the defect in the selection procedure created by the withdrawal of a nominee cannot be gainsaid. As set forth below, the failure to correct the procedural defect

would raise constitutional and statutory issues regarding the discretion of the Governor in making appointments and create possible conflicts between the executive and judicial departments.

It is a well-established principle that if issues in a case can be resolved on non-constitutional grounds, courts should avoid deciding constitutional issues. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995); *Watts v. Memphis Transit Mgt. Co.*, 462 S.W.2d 495, 498 (Tenn.1971).

Moreover, failure of this Court to correct the defect in the selection procedure would permit possible manipulation and political mischief that The Tennessee Plan was designed to prevent. Allowing the integrity of the selection process to be compromised would be an invitation to the Legislature to address the selection procedure to eliminate uncertainties resulting from an approval by this Court of the lower court's decision.

(B)

CONSTRUCTION OF THE TENNESSEE PLAN

The controlling issue in this case is the interpretation and construction of the statute creating The Tennessee Plan. Even though the statute sets forth in detail the selection procedure, the particular set of facts presented by this case is not directly provided for in the statute. Consequently, to resolve this, this Court should consider the present procedural impasse by reference to the systematic design of the selection plan for resolution of the present procedural impasse.

This Court has long held that courts in construing statutes must give effect to the legislative purpose and intent of the statute, as determined by the ordinary meaning of its text, rather than seek to alter or amend it. *Wausau Insurance Company v. Dorsett*, 172 S.W.3d. 538 (Tenn. 2005); *Freeman Industries, LLC v. Eastman Chemical Co.*, 172 S.W.3d 512 (Tenn. 2005). After discerning the intent and purposes, objectives and spirit of the statute, the courts must seek a reasonable construction based upon good sound reasoning. *Sallee v. Barrett*, 171 S.W.3d. 822 (Tenn. 2005).

The primary purpose of The Tennessee Plan is to nominate, appoint, and elect the "best qualified persons available for service" as appellate judges and justices. In addition, the statutory scheme was designed to improve the administration of justice and "enhance the prestige and respect for the courts by eliminating the necessity of political activities by appellate justices and judges; and to make the courts non-political." T.C.A. §17-4-101(a). The Plan utilizes the special knowledge and expertise of lawyers who represent the many and varied interests of litigants and who are most "familiar with the best qualifications and characteristics of judges" in order to find and select those who are "best qualified and available to serve." T.C.A. §§17-4-101(b) and 109(e). As found by the Chancellor, the Governor and Commission share responsibility for filling appellate court vacancies, though neither has "power or authority over the tasks of the other." (T/R 239, Opinion, p. 9)

T.C.A. §§17-4-109(e) and 112(a) mandate that the Commission "shall" select and certify "three (3) persons" "qualified and available to serve" as nominees to be considered by the Governor for appointment to fill the vacancies on the appellate courts.

The substance of the Plan, despite its elaborate details, is quite simple. The Commission, an agency of the Judicial Department, nominates, and the Governor, as head of the Executive Department, appoints. And perhaps most importantly, though not directly relevant to this case, the voters at the next election elect or reject the person selected by the Commission and the Governor in order to satisfy the constitutional requirement that justices of the Supreme Court be elected.

Under The Tennessee Plan, the Commission has the obligation and prerogative to nominate and the Governor has the obligation and prerogative to appoint from those nominated, subject only to applicable statutes and, of course, the Tennessee and the United States Constitutions. The Tennessee Plan must be construed to protect these respective obligations and prerogatives.

The Commission has the right and duty to nominate, in the first instance, three persons from whom the Governor may appoint one to fill the vacancy on the court. T.C.A. §17-4-109(e). However, the Governor may, in his discretion, reject all three of these nominees. T.C.A. §17-4-112(a). Reference in the statute to the word "panel" has created some confusion regarding the procedure. It should be noted that a "panel" has no duties. It is only a figure of speech, a list of the names. "Panel" as used in the statute is synonymous with the "three (3) persons qualified and available to serve" and the "three nominees." Therefore, submission of a panel and/or rejection of a panel has no meaning except in reference to the three nominees from whom the Governor has the right to appoint. The Commission cannot submit one or two nominees and call it a panel. The statute requires that it submit three nominees, not one or two, who are subject to appointment. The Commission has the right and duty to nominate three nominees. Those three persons must be "qualified **and** available to serve." T.C.A. §17-4-109(e). (Emphasis added.)[1] The Governor is

[1] With regard to the critical issues, the trial court's decision is on its face inconsistent. She approved the "rejection" of the first "panel," even though it included a nominee who was unavailable for appointment. However, that court found that the second "panel" was invalid because it included a nominee found to be "disqualified." The word "panel" is synonymous with the "three (3) persons." Thus, the Chancellor's decision concerning the defect in procedure is clearly erroneous. A panel of two created by withdrawal, i.e., the unavailability of Dinkins, obviously cannot be synonymous with "three persons."

If "panel," however, is determined not to be synonymous with "three persons," the Chancellor's "plain meaning" acceptance of the Governor's interpretation of 112(a) resulting in Gordon's exclusion from the "second panel" becomes clearly erroneous. The specific language of T.C.A. §17-4-112(a) is that the governor "may require the commission to submit one (1) other panel of three (3) nominees," the "second panel." It is not explicitly stated in the statute that the Legislature intended to require that this "second" or "other panel" contain three totally <u>different</u> and new nominees. The Governor conceded that "Tenn. Code Ann. §17-4-112(a) does not explicitly state that the second panel of nominees must consist of three new nominees and cannot include one or more of the nominees from the first panel." (T/R 7, Complaint, ¶24). However, the statute does not use the word "different" or "other" to modify the word, "nominees." Rather "other" and "second" are adjectives used to modify "panel."

If, as the Chancellor found, "panel" can be made up of two (2) nominees, it, *ipso facto*, cannot be synonymous with "three (3) nominees." The Governor's argument and the trial court's ruling below read the phrase, "one other panel of three (3) persons," to, in effect, mean "three (3) other, <u>different</u> persons." If the word "panel" is not synonymous with "the three nominees," however, then the words "one other" only modify "panel" and not "three nominees."

entitled to consider three nominees who are qualified **and** available to serve and may appoint from the three. This right and duty cannot be defeated or waived by act of the Commission, any nominee, nor even by the Governor himself. Again, these obligations are mandatory and the Commission cannot deny the Governor the right to choose from three nominees by nominating fewer than three persons who are qualified and available. The Plan assures that the Commission will be able to

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If not defined by the words, "three (3) persons" or "three nominees" the ordinary meaning of panel is "a list or group of persons selected for some purpose." Webster's Third New International Dictionary, at p. 1598. If as the Chancellor found, there can be a two person panel, it becomes obvious that when a name (or names) on a list is changed and a new name (or names) appears, or one or more of the names on the list is deleted and replaced, a new list that is a different and distinct one from the first may become "one other panel." Thus, under these circumstances, it is argued that a panel becomes "different' and "distinct" when the composition of the panel is not the same, i.e., when the list of persons is changed.

Had the legislature intended that the second panel should consist of three (3) totally "new," "different," or "other" persons, it could have explicitly stated that no nominee from the first panel could be a nominee on the second panel. It did not.

There is nothing in the statute that grants the Governor the authority to dictate who the Commission includes on or excludes from the "second" or "other" panel so long as the "second panel" is different. This omission, lack of expression of authority, is significant since this authority is expressed in other, specific categories. *State v. Godsey*, 60 S.W.3d 759 (Tenn. 2001); *Carver v. Citizens Utilities Co.*, 954 S.W.2d 34 (Tenn. 1977). Had the Legislature intended the Governor to possess such power, it would have expressly so provided. Under these circumstances, therefore, the September 7, 2006 panel of nominees should be ruled a valid panel.

nominate and that the Governor will be able to choose from or reject the first three nominees. He can only choose from among those nominated by the Commission.

This procedure which requires three nominees who are "qualified and available" is the core provision of The Plan. Any variation of this requirement would allow the selection process to be manipulated and could result, as it did here, in the Governor having fewer than six qualified and available nominees from which to appoint. The Chancellor recognized that "the statutory scheme of three nominees for the Governor to consider was frustrated by the events in this case." (T/R 237, Opinion, p. 7). The Chancellor, however, erred in holding that this essential provision requiring the Commission to submit three nominees was only "aspirational," not a "condition precedent". (T/R, 234 Opinion, p. 4).[2] This Court should not condone the departure from The Tennessee Plan which occurred in this case. To do so would set an unfortunate precedent for subsequent selections.

In this case, the exclusive rights and powers of the Governor and the exclusive rights and powers of the Commission were frustrated and denied and the vested rights of Gordon and Lewis were compromised. The precipitating factor was the withdrawal of Chancellor Dinkins. At that

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[2]The Chancellor held that the condition precedent created by T.C.A. §§17-4-109(e) (that the Commission "shall" select and nominate "three (3) persons whom the commission deems best qualified and available to fill the vacancy" was somehow diluted by reference to subsection 109(d) and was only an aspiration. (T/R 236, Opinion, p. 6). Appellant submits that 109(d) is not applicable. It deals with the preliminary investigation, inquiry and soliciting of qualified applicants and not with the core provisions of the Tennessee Plan requiring that there be three (3) nominees who are "qualified and available." See T.C.A. §17-4-101(a) and 109(e). This conclusion is buttressed by the fact that each applicant signs an agreement stating, "I hereby agree to be considered for nomination to the Governor for the office of Judge of the Supreme Court of Tennessee, and if appointed by the Governor, agree to serve that office." (¶63, Application for Nomination to Judicial Office (Supreme Court)). The Chancellor's conclusion that the requirement of one's "availability" under 101(a) and 109(e) to serve is only an "aspiration", not a "condition precedent" is erroneous. Ironically, she concluded that being "qualified" is a condition precedent for the completion of the second panel. (T/R 234, Opinion, p. 4). Both subsections 101(a) and 109(e) use the words "qualified" and "available" in conjunction with each other to describe the requirements for the three (3) nominees. Therefore, both qualification and availability are conditions precedent to there being a valid three (3) person panel.

point in the procedure, the right of the Commission to nominate three persons from which the Governor could appoint a justice was denied. The Governor could not appoint Chancellor Dinkins because Chancellor Dinkins was not "available" for appointment. These rights of the Governor and the Commission are fundamental to The Tennessee Plan and cannot be impaired by the action of the Commission, the Governor, or any nominee. Chancellor Dinkins' withdrawal, contrary to his agreement to be available, created the same situation that would have existed had the Commission nominated a person who did not apply for selection and, therefore, was not available, or a person disqualified by reason of residence, age, or lack of a license to practice law. In those situations, as in this case, there would have been a failure to comply with the statute, requiring the Commission to complete its duty to nominate three qualified and available nominees.

As stated above, the Chancellor recognized the statutory scheme was frustrated by Chancellor Dinkins' withdrawal. (T/R 237, Opinion, p. 7). The Chancellor also recognized that the appropriate remedy when the panel becomes incomplete is "to send the matter back to the Commission."[3] (T/R 234, Opinion, p. 4). However, she apparently failed to appreciate Gordon's position that the Commission be directed to choose a third nominee to replace Chancellor Dinkins. (T/R 237, Opinion, p. 7). Gordon did not and does not contend that the appropriate solution resulting from the defect in procedure is to "rescind all actions" and declare all of the proceedings "null and void," as suggested by the Chancellor. (T/R 237, Opinion, p. 7). Rather, the process went according to the Plan until Chancellor Dinkins withdrew. That withdrawal created a deficiency in the proceedings which required correction before the process could continue. Only those proceedings subsequent to Chancellor Dinkins' withdrawal were null and void. It is at that point that the process should begin

[3] This is the "remedy" she crafted related to the second panel found to be incomplete after her removal of Gordon.

anew. Therefore, the Governor's letter of July 24, 2006 can be given only one meaning. It was notice that another person needed to be chosen to replace Chancellor Dinkins. It follows, therefore, that the Commission's subsequent action was also void and of no legal consequence. The remedy must obviate the consequences of the defect and can do so only by starting again at the point at which the defect occurred.

In addition to giving effect to the selection procedure mandated by The Tennessee Plan, there is another compelling reason for restarting the procedure by replacing Chancellor Dinkins as a nominee. Upon being nominated and certified by the Commission, Gordon and Lewis became vested with the legal right to be considered for appointment. That right was frustrated by Chancellor Dinkins' withdrawal. The Governor could not deny the Commission the right to present three nominees from whom he could choose, neither could he waive the right to have three nominees "qualified and available" from which to choose. Further, he could not deny Gordon's and Lewis' rights to be considered.

Gordon and Lewis, having applied for the vacancy, having completed the application process, having been interviewed and investigated by the Commission, having been selected as "qualified and available to serve" by the Commission, and having been certified as nominees, have a vested right in the statutory procedure established by the Legislature.[4] Having accepted the State's invitation to engage in the process, they have a vested right in seeing that the statutory mandates of the process are followed. See *Miles v. Tennessee Consolidated Retirement System*, 548 S.W.2d 299 (Tenn.

[4] The Chancellor explicitly found that Gordon had demonstrated his standing as a necessary party and had raised issues creating a substantial interest in this matter. (T/R 48, Memorandum and Order, December 6, 2006).

1976). (Holding that judges under state's retirement system were entitled to have the State honor its commitments.)

Although the Chancellor correctly recognized that either unavailability or disqualification of a nominee conflicts with the scheme of the legislation, her failure to correct the procedural defect created by such circumstance leaves the process open to manipulation and frustration of the selection plan. Consider, for example, under the lower court's reasoning, what would occur if the Commission certified three nominees, two of whom withdrew and the third died or became disabled. Under the reasoning of the court below, the Governor would only be entitled to choose from three nominees (the "second panel") because the Commission, having "certified" a panel, would not be allowed to replace the three nominees who were not "available" for appointment. Since the Chancellor ruled that availability was only an "aspiration," not a mandated requirement, the Governor's choices would be limited to only three, not the six envisioned by the Legislature. It takes very little imagination to conceive of how the field of "available" candidates could be manipulated to reduce the choices available to the Governor. The lower court's interpretation of this core provision of The Tennessee Plan destroys the integrity of the selection process, thereby defeating its overarching purpose. If the decision below is allowed to stand, The Tennessee Plan can be manipulated for less than laudable goals in the future. If the intent and purpose of the statute to provide the opportunity for six qualified and available persons to be considered for appointment to the Supreme Court is frustrated in this case, a precedent would be set that would allow frustration of the selection process in the future. This Court is urged to foreclose this possibility by correcting the procedural defect here and ruling that when a certified nominee becomes unavailable or disqualified, the Commission must replace such nominee and thus submit three nominees who are "qualified and available for service." The integrity of The Tennessee Plan must be preserved for filling the present

vacancy and future judicial vacancies. The obligation and prerogative of the Commission to nominate, the obligation and prerogative of the Governor to appoint and the vested legal rights of Gordon and Lewis to be considered for appointment will be protected by an order directing the Commission to choose from the original applicants a person to replace Chancellor Dinkins as a nominee and further directing the Commission and the Governor to follow the provisions of The Tennessee Plan thereafter.

Therefore, we submit that this Court should reverse the decision of the Chancellor below and declare that when any nominee selected under T.C.A. §17-4-109(e) becomes unavailable or disqualified, the Judicial Selection Commission shall replace the unavailable or disqualified person with another nominee.[5]

[5] Alternatively, as set forth in footnote 1, *supra*, if it should be determined by this Court that the Chancellor was correct in her implicit determination that the word, "panel," as used in T.C.A. §17-4-112(a) is not synonymous with or defined by "three (3) persons," this Court is requested to declare that the September 7, 2006 panel is valid and that Gordon was properly nominated.

II.

THE INTERNALLY INCONSISTENT RULING BY THE TRIAL COURT CREATED A QUAGMIRE OF LEGAL ISSUES THAT CAN BE AVOIDED BY AN ORDER CORRECTING THE PROCEDURAL DEFECT.

As set forth above in Section I of this Brief, if the argument and rationale asserted by Gordon herein is accepted, i.e., that The Tennessee Plan requires that "panel" be read as synonymous with "three (3) persons" or "three nominees," there is no conflict between the rights, duties and prerogatives of the Governor and the Judicial Selection Commission under The Tennessee Plan. Similarly, in the alternative, if the word, "panel," found in subsection 112(a) is not the same as the "three nominees," (as implicitly found by the Chancellor below when she determined that a nominee's availability was only an "aspiration," not a condition precedent), then the September 7, 2006 certified list of three nominees is a valid "one other panel" and there is still no conflict between the rights, duties and prerogatives of the Governor and those of the Commission.[6] Logically, the wording of subsection 112(a) must be read consistently with one of these two alternatives. The Chancellor's opinion below is, therefore, internally inconsistent.

Either reading posed by Gordon avoids the legal issues and disputes that were presented by the trial court's opinion. The failure to recognize and follow the procedural requirements of The Plan by the Governor and the Commission and the failure to enforce those requirements by the court below raise serious issues of public policy, statutory interpretation and application of constitutional principles which are being hotly debated but presently are unresolved.

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[6] See footnote 1 above.

Both the assurance of diversity and equal treatment without regard to race are of paramount and fundamental importance to the preservation of our free society. The ways, means, and procedures necessary to do both are being debated in legislatures, executive offices and courts throughout the country. When implicated in litigation, these concerns necessarily involve a fact based review of governmental actions by courts applying "strict scrutiny."[7] If the Chancellor's error in failing to construe the wording of The Tennessee Plan in a consistent manner is not reversed and no order is entered correcting the procedural defect, the door is left open for the continuation of the unnecessary conflict and dispute between the Governor's office and the Commission that has directly impacted the rights, privileges and interests of Gordon and Lewis. If not avoided, that dispute, being one of interpretation of facts, motives, and impact for which the fundamental, procedural due process requirements apply, would necessitate further hearings, involving the determination of factual issues with attendant discovery and proof.

The Intervenor Gordon reluctantly finds himself at the center of this controversy. As stated at the beginning, there is no conflict or dispute between the Governor and the Commission if there is compliance with the procedure set forth in the statute. Compliance with The Tennessee Plan avoids

[7] The legal issues raised by the Commission's response to the Governor's actions and by the Chancellor's opinion below are discussed at length in Intervenor Lewis' Brief filed herein. Appellant does not seek to further discuss those arguments; he believes that those arguments are unnecessary in the matter *sub judice*.

consideration of the Tennessee Human Rights Act, the Civil Rights Act and the equal protection clause of the Tennessee Constitution.

Gordon respectfully submits that the integrity and purpose of The Tennessee Plan, the respective prerogatives, roles and responsibilities of both the Governor and the Judicial Selection Commission will be implemented and preserved, the rights and privileges of applicants and nominees for appointment to the Supreme Court, now and in the future, will be protected, and the interests of the citizens of Tennessee will best be served, protected and preserved by this Honorable Court's correction of the procedural defect below.

CONCLUSION

For all of the above reasons, this Court is requested to reverse the decision of the Chancellor below and enter an order correcting the procedural defect by having the Judicial Selection Commission submit a third nominee's name to the two nominees certified on July 18, 2006 or, in the alternative, declare the three nominees named on September 7, 2006 as constituting a valid panel.

RESPECTFULLY SUBMITTED this the 12th day of January, 2007.

BONE, McALLESTER, NORTON, P.C.

BY: 

/s/ Charles W. Bone
Charles W. Bone (#002366)
Charles Robert Bone (#021161)
Attorneys for Intervenor
511 Union Street, Suite 1600
Nashville, TN 37219
615-238-6300

LYLE REID (#07779)
Attorney for Intervenor
P. O. Box 198
Brownsville TN 38012
731-772-7441

IRMA MERRILL STRATTON (#011605)
Attorney for Intervenor
2121 One Commerce Square
Memphis, TN 38103
901-526-6464

TIMOTHY W. SMITH (#020291)
Attorney for Intervenor
2670 Union Extended, Suite 1200
Memphis, TN 38112
901-323-8048

Attorneys for Appellant, J. Houston Gordon

CERTIFICATE OF SERVICE

Counsel for Appellant, J. Houston Gordon, certify that on this the 12th day of January, 2007, a true and correct copy of the foregoing was emailed to:

ROBERT E. COOPER, JR.
Attorney General and Reporter
JANET M. KLEINFELTER
Senior Counsel
Special Litigation Division
425 5th Avenue North
Nashville, Tennessee 37243

BEN H. CANTRELL
Tune, Entrekin & White
315 Deadrick Street
AmSouth Center, Suite 1700
Nashville, Tennessee 37238

JOHN HICKS
Baker, Donelson, Bearman & Caldwell
211 Commerce Street
Suite 1000
Nashville, Tennessee 37201

/s/ Charles W. Bone